

<hr/>		)	
In the Matter of:		)	
		)	
RONALD CROUSE (Dec.)		)	
CONSTANCE CROUSE (Widow)		)	
Claimant		)	
		)	Case No. 98-LHC-996
v.		)	
		)	OWCP No. 01-140260
BATH IRON WORKS CORPORATION		)	
Employer		)	
		)	
COMMERCIAL UNION INSURANCE		)	
COMPANY		)	
Carrier		)	
<hr/>		)	

APPEARANCES:

G. William Higbee, Esq.  
For The Claimant

Richard F. van Antwerp, Esq.  
For The Employer/Carrier

Before: JOHN M. VITTON  
Chief Administrative Law Judge

**DECISION AND ORDER — AWARDING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Ronald Crouse (deceased Claimant) and Constance Crouse (widow of Claimant) against Bath Iron Works Corporation (Employer) and Commercial Union Insurance Company (Carrier).

On January 26, 1998, this matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on November 4, 1998, in Portland, Maine. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 19 exhibits, Employer/Carrier proffered no exhibits which were admitted into evidence. This

decision is based upon a full consideration of the entire record.<sup>1</sup>

Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

### **STIPULATIONS**

At the commencement of the hearing, the parties stipulated (Tr. 6-7):

1. That the Longshore and Harbor Workers' Compensation Act applies.
2. That all filings were timely.
3. That the relevant national average weekly wage for the permanent total disability claim from January 21, 1997, through August 3, 1997, and the death claim from August 4, 1997, and continuing is \$400.32.

### **ISSUES**

The unresolved issues presented by the parties are (Tr. 5-6):

1. Causation.
2. Permanent total disability and § 9 death claim benefits.
3. Employer's application for § 8(f) Special Fund relief.
4. Section 14(e) penalties, interest and attorney's fees.

### **STATEMENT OF THE CASE**

#### **The Testimonial Evidence**

#### **Ronald Crouse**

Claimant Ronald Crouse testified by affidavit on March 19,

---

<sup>1</sup> References to the transcript and exhibits are as follows:  
Transcript: Tr.\_\_\_\_ ; Claimant's Exhibits: CX-\_\_\_\_.

1997, (CX-9), and again by deposition on June 26, 1997, (CX-10). He reported that he was sixty-six years old and had been married to Constance Crouse since 1950. (CX-6). He further testified that they had five grown children and he had completed his freshman year of high school. (CX-9, p. 1).

Mr. Crouse testified that he worked as a tacker at Andrew E. Peterson in Bath, Maine, from January 1948 through April 1951, but cannot recall whether he was exposed to asbestos there. In April 1951, he became employed with Hyde Windlass Company in Bath, Maine, which was a machine shop subcontractor for Employer. He remained with Hyde Windlass until it merged with Employer in December 1968. (CX-9, p. 1; CX-8, p. 2).

Mr. Crouse reported that he worked for Employer from January 6, 1969, through April 17, 1971. While working for Employer, he was classified as a second-class painter earning \$3.30 per hour. (CX-9, pp. 1-2; CX-8, p. 3). During his time with both Hyde Windlass and Employer, Mr. Crouse testified that he worked within the confines of Employer's shipyard and aboard ships being constructed and renovated for the United States Navy. He further testified that his work aboard the ships was "very confined and consisted of living compartments, engine rooms, etc." (CX-9, p. 2).

Mr. Crouse testified that he "scraped off old paint and any residue from old piping and machinery that was previously covered with asbestos...[and would] 'blow down' compartments with a high pressure air hose to remove bits of asbestos fiber and debris left from pipecoverers and other trades that had previously performed work in these areas. [He] then swept the waste from the floor after it settled..." Mr. Crouse reported that "[v]entilation aboard ships was poor and usually only consisted of blowers that did not

cleanse the air." He further reported that while working on the ships there was "a lot of dust" in the air. (CX-9, p. 2; CX-10, pp. 7-8).

Mr. Crouse testified that he was "extensively exposed" to asbestos while working for Hyde Windlass and Employer. He personally handled asbestos adhesive, gaskets, insulating pads, pipecovering, piping, rope, steam line insulation, tape, and tubing. He also worked around pipecoverers who were working with asbestos. (CX-9, p. 2; CX-10, pp. 9-10).

Mr. Crouse reported that while working for Hyde Windlass and Employer, he was never informed of the potential hazards of inhaling asbestos dust and fibers, nor was he advised to wear

protective breathing devices or clothing. (CX-9, p. 2).

Mr. Crouse testified that after he left Employer in 1971, he became a self-employed housepainter until his retirement in 1992. He further testified that to the best of his knowledge, he was never exposed to asbestos as a housepainter. (CX-9, p. 3; CX-10, p. 11).

Mr. Crouse testified that his health was "fine" up until his last illness as he often went on walks. He reported that after he became ill, he could not go on walks any more. (CX-10, p. 12). He further reported that beginning in October 1996 he started feeling poorly, e.g., he could not stop coughing and had trouble sleeping. (CX-10, p. 13).

Mr. Crouse testified that in January 1997 he was diagnosed with mesothelioma by Dr. Seth Blank. (CX-10, p. 14). He reported that two quarts of fluid were drained from his back, and there was substantial swelling and pain in his back. He further testified that he has been to the hospital three times for drainage. (CX-10, p. 15).

Mr. Crouse testified that he has had radiation about 20 times. He further testified that he was taking medication for pain, which only sometimes helped. He reported that at the time of the deposition, he was using supplemental oxygen. (CX-10, p. 16). He further reported that he could only walk about twenty feet before he had to stop and rest, and that he has lost several pounds since he became ill. (CX-10, p. 18).

### **Constance Crouse**

Constance Crouse testified that she married Ronald Crouse in 1950, and that they were living together as husband and wife at the time he died. She reported that she was the only dependent of Ronald Crouse at the time of his death. She corroborated her late husband's testimony that he began working with Employer as a painter from 1969 through the spring of 1971, and thereafter became a self-employed painter until his voluntarily retirement in 1992. (Tr. 12-13; CX-6; CX-8).

Mrs. Crouse reported that after her husband was diagnosed with mesothelioma, "he was just completely helpless. He couldn't eat and he couldn't - nothing. He couldn't even sleep in his own bed. He had to sit up. He was always short of breath..." She further reported that he was using oxygen for several months before his death, and from June 1997 until his death in August 1997, he was confined to bed. She testified that he could not do anything by

himself. She had to help him wash himself, tie his shoes, and put his pants on for him. (Tr. 14-15).

Mrs. Crouse testified, on cross-examination, that her husband was smoking when they were married in 1950. (Tr. 15). She further testified that she has not filed a lawsuit against any tobacco companies. (Tr. 17).

## **The Medical Evidence**

### **Mid Coast Hospital**

A medical report, dated June 18, 1996, indicated that Mr. Crouse had an obstructive airway disorder. (CX-15, p. 1). A radiology report, dated November 6, 1996, provided an impression of large right layering pleural effusion with associated right lower lobe atelectasis<sup>2</sup>. (CX-15, p. 3). A radiology report, dated November 8, 1996, provided an impression of right pleural effusion<sup>3</sup> without discrete pneumothorax<sup>4</sup> post thoracentesis<sup>5</sup>. (CX-15, p. 2).

An operative report, dated November 8, 1996, showed a history of Mr. Crouse being a former smoker with persistent atelectasis and right pleural effusion. A CT scan of the chest revealed an extensive right pleural effusion without pleural thickening, hilar, or mediastinal adenopathy<sup>6</sup> or pulmonary parenchymal infiltrate. A post-procedure chest radiograph revealed residual large right pleural effusion without evidence of pneumothorax. Mr. Crouse was discharged to resume his usual activities and diet. (CX-15, p. 4). A surgical pathology report, from data collected pursuant to the November 8, 1996 thoracentesis, provides a pleural fluid diagnosis of "atypical mesothelial cells present, associated with acute

---

<sup>2</sup> Atelectasis is an incomplete expansion of a lung or a portion of a lung, occurring as a primary, congenital, or secondary condition, or as an acquired condition. Dorland's Illustrated Medical Dictionary 154 (28th ed. 1994).

<sup>3</sup> Pleural effusion is the presence of liquid in the pleural space. Id. at 531.

<sup>4</sup> Pneumothorax is an accumulation of air or gas in the pleural space, which may occur spontaneously or as a result of trauma or a pathological process, or be introduced deliberately. Id. at 1319.

<sup>5</sup> Thoracentesis is a surgical puncture of the chest wall into the parietal cavity for aspiration of fluids. Id. at 1705.

<sup>6</sup> Adenopathy is the enlargement of the glands. Id. at 28.

inflammatory cells. The cytological characteristics and the ancillary inflammatory response suggests reactive mesothelial cell proliferation but a malignant process can not be ruled out." (CX-15, p. 5).

A radiology report, dated December 30, 1996, provides a diagnosis of moderate right pleural effusion and changes of emphysema. (CX-15, p. 6).

An operative report, dated December 31, 1996, indicates that Mr. Crouse underwent thoracentesis. The report indicates that he underwent thoracentesis because "[a] repeat chest radiograph reveal[ed] a non-loculated right pleural effusion, therefore repeat diagnostic thoracentesis is indicated." (CX-15, p. 8). A radiology report, dated December 31, 1996, provided findings of "near complete drainage of the right pleural effusion with minimal blunting of the right costophrenic sulcus remaining. A small amount of density remains against the medial right heart border just above the right hemidiaphragm which may represent an area of atelectasis or infiltrate. A discrete hilar mass is not seen on this film nor on the lateral film of 12/30/96. No pneumothorax is identified." The report provided impressions of "no pneumothorax is noted post thoracentesis. A few small basilar densities remain along with minimal remanent pleural effusion." (CX-15, p. 7).

A surgical pathology report, with data received December 31, 1996 and completed January 2, 1997, provided a final diagnosis of "pleural fluid highly suspicious for mesothelioma." (CX-15, p. 9).

A radiology report, dated March 4, 1997, provided an impression there was "increasing right pleural effusion with now the lower 50% of the right hemithorax suspected to be filled with fluid." (CX-15, p. 10).

#### **Dr. Paul J. LePrad**

Dr. Paul J. LePrad, board certified in internal medicine with subspecialties in pulmonary and critical care, first examined Mr. Crouse on October 1, 1996. At that time, he received an impression of severe obstructive airway disease and atelectasis to the right middle lobe with associated fluid with the major and minor fissures. Mr. Crouse was prescribed Albuterol and Atrovent MDI for his obstructive airway disease. (CX-13, p. 1).

Dr. LePrad examined Mr. Crouse on November 4, 1996, for a follow-up evaluation. A CT scan of the chest with contrast revealed a large right pleural effusion with associated right middle and lower lobe atelectasis. There was also mild focal pleural thickening noted within the posterior right base. Dr.

LePrad concluded that Mr. Crouse's obstructive airway disease was well controlled. (CX-13, p. 4).

Dr. LePrad examined Mr. Crouse on November 25, 1996, for treatment of complicated suspected parapneumonic pleural effusion that had hospitalized him. A chest radiograph revealed total resolution of the right pleural effusion with no infiltrates. (CX-13, p. 5).

Dr. LePrad examined Mr. Crouse on December 30, 1996, on Mr. Crouse's request due to his "increased cough that is minimally productive of non-purulent sputum, right sided chest pain and mild dyspnea." A chest radiograph revealed recurrence of the right pleural effusion without associated pulmonary parenchymal infiltrates or discernible hila or mediastinal adenopathy. A right lateral decubitus chest radiograph revealed a large mobile pleural effusion. Dr. LePrad recommended repeat diagnostic thoracentesis. (CX-13, p. 6).

Dr. LePrad examined Mr. Crouse on January 6, 1997, after the repeat thoracentesis for recurrent right pleural effusion. Dr. LePrad noted diminished right basilar breath sounds and a palpable nodular density was noted within the right mid chest wall "perhaps indicative of chest wall malignant involvement." The cytologic evaluation revealed "the presence of reactive mesothelial cells consistent with a diagnosis of mesothelioma." (CX-13, p. 7).

Dr. LePrad examined Mr. Crouse on February 3, 1997, for a follow-up evaluation regarding his right malignant mesothelioma. Dr. LePrad noted that Mr. Crouse underwent "diagnostic thorascopic pleural biopsy with talc pleurodesis on January 16, 1997." Dr. LePrad reported that since his hospital discharge, Mr. Crouse has complained of right chest pain and expanding chest wall mass. Dr. LePrad recommended that Mr. Crouse's malignant mesothelioma Stage III be treated with palliative external beam radiation therapy. (CX-13, p. 8).

Dr. LePrad examined Mr. Crouse on March 3, 1997, for a follow-up examination regarding his right malignant pleural effusion. Mr. Crouse had completed approximately one-half of his prescribed external beam radiation therapy. Dr. LePrad noted that despite the therapy, Mr. Crouse had developed progressive dyspnea, weight loss, and decreased functional capacities. A chest radiograph revealed progression of the right pleural effusion which occupied approximately 50% of the hemithorax. Dr. LePrad opined that Mr. Crouse had radiographic and clinical progression of his right malignant mesothelioma. Mr. Crouse was asked to continue external

beam radiation therapy. Dr. LePrad noted that Mr. and Mrs. Crouse were aware of Mr. Crouse's limited life expectancy. (CX-13, p. 9).

Dr. LePrad, in a letter dated August 15, 1997 to Claimant's attorney, opined that Mr. Crouse's malignant mesothelioma is most likely secondary to his prior asbestos exposure. He noted that Mr. Crouse died on August 2, 1997. (CX-13, p. 10; CX-7).

**Dr. Seth D. Blank**

Dr. Seth D. Blank, board certified in thoracic surgery, first examined Mr. Crouse on January 14, 1997. At that time, he reviewed Mr. Crouse's x-rays and CT scans and delivered a diagnosis of right pleural effusion. He recommended a biopsy of the chest tube "in addition to draining the pleural fluid and performing a talc pleurodesis." (CX-11, p. 1).

Dr. Blank examined Mr. Crouse on January 28, 1997, as a follow-up to his right thoracoscopy, talc pleurodesis, and pleural biopsy. He noted the final pathology results indicated a malignant mesothelioma, epithelial type. He reported Mr. Crouse's right lung was decreased at the base and the left lung was clear. Dr. Blank opined that a course of radiation treatment might be of some benefit to Mr. Crouse for his subcutaneous mass irritation. (CX-11, p. 2).

**Maine Medical Center**

An admission record from Maine Medical Center, dated January 16, 1997, indicated Mr. Crouse underwent a right thoracoscopy on January 16, 1997. (CX-14, p. 1). A discharge summary, dated January 22, 1997, indicated a principal diagnosis of recurrent right pleural effusion with associated diagnoses of severe chronic obstructive pulmonary disease and a history of hypertension. (CX-14, p. 2).

A post operation report, dated January 21, 1997, provided an impression of a right-sided chest tube with its tip overlying the right upper lung zone, tiny right apical pneumothorax with subcutaneous emphysema in the right neck base soft tissues, right pleural effusion, and streaky atelectasis of the medial left lung base. (CX-14, p. 9). A report dated January 23, 1997, provided an impression of small right apical pneumothorax, right pleural effusion, and left basilar subsegmental atelectasis. (CX-14, p. 10).

A PA and lateral chest exam report, dated January 28, 1997,



provided an impression of increased size of the right pleural effusion and no evidence of a pneumothorax. (CX-14, p. 14).

**Dr. Jeffrey A. Young**

Dr. Jeffrey A. Young, board certified therapeutic radiologist, first examined Mr. Crouse on February 5, 1997, on a referral for palliative radiation. Dr. Young emphasized that he "made it clear to [Mr. and Mrs. Crouse] that this was not a curative situation but we could hopefully control his discomfort and hope for a slow progression of his disease." Dr. Young opined a higher dosage of radiation was needed and chemotherapy with radiation may give better results. Dr. Young prescribed Percocet for Mr. Crouse's pain. (CX-12, pp. 1-2).

A report from Dr. Young, dated March 11, 1997, noted Mr. Crouse's condition was "essentially unchanged." (CX-12, p. 3). A final report, dated March 18, 1997, from Dr. Young provided a diagnosis of "malignant mesothelioma, locally recurrent on the posterior chest wall and flank" for Mr. Crouse. (CX-12, p. 4).

**Dr. Jerrold L. Abraham**

Dr. Jerrold L. Abraham, board certified in anatomic pathology, in a letter to Claimant's counsel dated October 29, 1998, reported that he had reviewed the pathology materials from Mr. Crouse's biopsies. He further reported that the slides confirm an invasive malignancy in the pleura and a pattern of "tubulo-papillary tumor, typical for epithelial mesothelioma." (CX-19).

Dr. Abraham noted that, according to the records, Mr. Crouse had first had an exposure to asbestos around 1950. He emphasized that the latency observed in the diagnosis of mesothelioma is "certainly typical." Dr. Abraham explained that "asbestos exposure is well recognized to be a major cause of malignant mesothelioma. Therefore, I can conclude to a reasonable degree of medical certainty that Mr. Crouse's occupational asbestos exposure was the cause of his malignant mesothelioma and death." (CX-19).

**The Contentions of the Parties**

Claimant contends that during her husband's employment, primarily as a painter, with Hyde Windlass Company (a subcontractor for Employer) and Employer he was exposed to asbestos and that his mesothelioma and subsequent death was due to his exposure to asbestos. (Tr. 5).

Employer contends that Mr. Crouse has a long history of cigarette smoking which was the cause of Mr. Crouse's cancer and

subsequent death.

## DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F. 2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

### A. Causation

Section 20(a) of the Act, 33 U.S.C. § 920(a), creates a presumption, absent substantial evidence to the contrary, that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). Substantial evidence means more than a scintilla, more specifically, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971).

Section 20(a) also provides in pertinent part, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary...that the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). As the Fourth Circuit has noted, "the presumption is a broad one, and advances the facility with which claims are to be treated to further the

Act's purpose of compensating injured workers regardless of fault. But that procedural facilitating device is not a substitute for substantive evidence which an injured worker must present to be entitled to compensation." Universal Maritime Corp. v. Moore, 126 F.3d 256, 262, 31 BRBS 119 (CRT) (4th Cir. 1997); See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 614.

A claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS (5th Cir. 1982).

Claimant has established sufficient evidence to invoke the Section 20(a) presumption. Mr. Crouse suffered from mesothelioma which eventually resulted in his death. Dr. Abraham credibly stated that Mr. Crouse's exposure to asbestos while he was working for Employer "was the cause of his malignant mesothelioma and death." Such an injury as Claimant alleges could have resulted in a defect in the human frame. Therefore, a harm could have resulted in the manner described by Claimant. Consequently, Claimant has invoked the Section 20(a) presumption.

Thus, Claimant has established a prima facie case that her husband suffered an "injury" under the Act, and that his working conditions and activities could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the worker's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with **specific and comprehensive medical evidence** proving the absence of, or severing, the connection between the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, the employer must establish that the claimant's

condition was not caused or aggravated by his employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

In this case, Employer has not presented facts or substantial countervailing evidence to rebut the presumption that Mr. Crouse's employment did not cause, contribute to, or aggravate his condition.

Employer presented no medical evidence or opinions to rebut the Section 20(a) presumption. Employer alleges that Mr. Crouse's cigarette smoking caused his death, but Dr. Abraham credibly stated that Mr. Crouse's occupational asbestos exposure while working for Employer "was the cause of his malignant mesothelioma and death." Since Employer did not establish that Mr. Crouse's condition was not caused, in part, or aggravated by his employment, the Section 20(a) presumption still applies. Rajotte, supra. Accordingly, the record is devoid of any evidence rebutting Claimant's invocation of the Section 20(a) presumption.

#### **B. Permanent Total Disability and § 9 Death Claim**

The burden of proving the nature and extent of his disability rests with the claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by a claimant before

reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22

BRBS 100 (1988). Once a claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Employer contends that Mr. Crouse developed lung cancer due to his decades years of cigarette smoking. Claimant contends that her husband developed mesothelioma and eventually died of respiratory failure due to his years of exposure while working around asbestos at Employer's business.

The medical evidence is clear and convincing that Mr. Crouse was diagnosed with mesothelioma in January 1997. (CX-15, p. 9; CX-13, p. 7; CX-11, p. 2; CX-14, p. 4; CX-12, p. 4; CX-19). The record is also clear that Mr. Crouse was exposed to asbestos while employed as a second-class painter with Employer in the late 1960's and early 1970's. (CX-9, pp. 1-3; CX-10, pp. 5-10; CX-8, p. 2). The credible medical opinion of Dr. Jerrold Abraham explains that "asbestos exposure is well recognized to be a major cause of malignant mesothelioma." Dr. Abraham credibly concludes, to a reasonable degree of medical certainty, that Mr. Crouse's occupational asbestos exposure was the cause of his malignant mesothelioma and death. (CX-19).

Based on Dr. Abraham's medical opinion, I find and conclude that the weight of the evidence indicates that Mr. Crouse's mesothelioma constitutes a work-related injury for which he may be

compensated under the Act. I further find that Mr. Crouse reached maximum medical improvement on January 21, 1997, the date he first received a positive diagnosis for malignant mesothelioma. (CX-14, p. 8). The Board has held that an irreversible medical condition is permanent per se. Drake v. General Dynamics Corp., 11 BRBS 288 (1979). Mesothelioma is such a condition. Accordingly, I find and conclude that Mr. Crouse was permanently and totally disabled from the date he was diagnosed with mesothelioma, January 21, 1997, until the date of his death, August 2, 1997. Furthermore, Employer is responsible for all reasonable medical expenses related to Mr. Crouse's work-related mesothelioma pursuant to Section 7 of the Act. 33 U.S.C. § 7.

Section 9 of the Act provides in pertinent part:

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding \$3,000,

(b) If there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average wages of the deceased during widowhood...

(e) In computing death benefits, the average weekly wage as prescribed in Section 6(b)...

33 U.S.C. § 9.

In a claim for death benefits, such as the present case, the right to death benefits is separate and distinct from any right to disability benefits and arises only at the time of death. Puig v. Standard Dredging Corp., 599 F.2d 467, 469 (1st Cir. 1979). In a claim for death benefits, the time of the claimant's injury (e.g., the widow's injury) cannot be prior to the employee's date of death. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46, 53 (1990); Lynch v. Washington Metro. Area Transit Auth., 22 BRBS 351, 354 (1989).

As noted above, funeral expenses under Section 9(a) are limited to \$3,000 and cover only actual expenses up to that sum. In the present case, the actual and uncontested funeral expenses were \$4,338. (CX-7). The Employer and not the Special Fund is liable for \$3,000 of these expenses. Bingham v. General Dynamics Corp., 20 BRBS 198, 205 (1988). Furthermore, in accord with Section 9(b) of the Act, widow benefits are payable to Constance Crouse at the stipulated national average weekly wage of \$400.32.

Pursuant to 28 U.S.C. § 1961, Employer shall pay Constance Crouse interest on all accrued unpaid death benefits, including funeral expenses from August 2, 1997, the date of Ronald Crouse's death. Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc., 22 BRBS 46 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), on recon. 17 BRBS 20 (1985).

### **C. Section 8(f) Special Fund Relief**

Section 8(f) of the Act limits Employer's liability to a claimant to one hundred and four (104) weeks if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury, and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability which is greater than that resulting from the first injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); FMC Corporation v. Director, OWCP, 886 F.2d 1185 (9th Cir. 1989), 23 BRBS 1 (CRT); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110 (4th Cir. 1982), 14 BRBS 716; Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440 (3d Cir. 1979), 10 BRBS 621; C & P Telephone v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), 6 BRBS 399; Equitable Equipment Co. v. Hardy, 558 F.2d 1192 (5th Cir. 1977), 6 BRBS 666; Shaw v. Todd Pacific Shipyards, 23 BRBS 96 (1989). The provisions of Section 8(f) are to be liberally construed. Director v. Todd Shipyard Corporation, 625 F.2d 317 (9th Cir. 1980), 12 BRBS 518.

Employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent injury. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748 (5th Cir. 1990), 23 BRBS 34 (CRT). Furthermore, the employer has the burden of proving that the three requirements of the Act have been met. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110 (4th Cir. 1982), 14 BRBS 716. Mere existence of a prior injury does not by itself establish a pre-existing disability for the purposes of Section 8(f). American Shipbuilding v. Director, OWCP, 865 F.2d 727 (6th Cir. 1989), 22 BRBS 15 (CRT).

The First Circuit has held that smoking cannot become a qualifying disability for the purposes of Section 8(f) until it results in "medically cognizable symptoms that physically impair the employee." Sacchetti, 681 F.2d at 40.

While the record indicates that a preliminary request for Section 8(f) Special Fund Relief was filed with the District Director, this issue was not pursued at the formal hearing. (Tr.

7). Moreover, the Employer presented no further evidence post hearing. Nevertheless, I specifically find and conclude that the Employer is not entitled to Section 8(f) Special Fund Relief since the malignant mesothelioma in and of itself was the cause of Ronald Crouse's death. (CX-19).

#### **D. Section 14(e) Penalty, Interest and Attorney's Fees**

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer filed a timely notice of controversion on April 4, 1997. In accordance with Section 14(b) of the Act, Mr. Crouse was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.<sup>7</sup> Thus, Employer was liable for compensation on April 18, 1997. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801 n. 3 (1981). A notice of controversion should have been filed by May 2, 1997, to be timely and prevent the application of penalties. Thus, I find and conclude that Employer filed a timely notice of controversion on April 4, 1997.

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board has concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and has held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the

---

<sup>7</sup> Section 6(a) does not apply since Claimant suffered his disability for a period of more than fourteen days.



yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney filed a fee application on December 1, 1998, concerning services rendered and costs incurred in representing Claimant between December 11, 1997,<sup>8</sup> and November 4, 1998. Attorney G. William Higbee seeks a fee of \$2,488.83 (including paralegal fees and expenses) based on 19.50 hours of attorney and paralegal time at variable hourly rates.

Counsel for Claimant is hereby allowed twenty (20) days from the date of service of this decision to submit a supplemental petition for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

#### ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for permanent total disability from January 21, 1997, the date of Mr. Crouse's diagnosis with mesothelioma, through August 2, 1997, the date of Mr. Crouse's death, based on the stipulated national

---

<sup>8</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after January 26, 1998, the date the matter was referred from the District Director.

average weekly wage of \$400.32, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Mr. Crouse's mesothelioma, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. § 7.

3. Employer shall pay funeral expenses of \$3,000, in accordance with Section 9(a) of the Act. 33 U.S.C. § 909(a).

4. Employer shall pay Constance Crouse, widow of Ronald Crouse, death benefits from August 2, 1997, the date of Ronald Crouse's death, and continuing, based on the stipulated national average weekly wage of \$400.32, in accordance with the provisions of Section 9 of the Act. 33 U.S.C. § 9.

5. Pursuant to 28 U.S.C. § 1961, Employer shall pay Constance Crouse interest on all accrued, unpaid death benefits, including funeral expenses, from the date of death, August 2, 1997. Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc., 22 BRBS 46 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), on recon. 17 BRBS 20 (1985).

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

7. Claimant's counsel shall have twenty (20) days to file a supplemental fee petition with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

---

JOHN M. VITTON  
Chief Administrative Law Judge

Dated: May 4, 1999  
Washington, D.C.

JMV/jla